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EXAMINER

GOODMAN, CHARLES

ART UNIT

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 19

Application Number: 09/054,565
Filing Date: April 03, 1998
Appellant(s): SIMPSON, JACK RICHARD

Larry L. Coats
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed February 4, 2002.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

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(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The Appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The Appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because the Appellant did not provide separate reasons for each of the numerous groupings of claims as set forth in 37 CFR 1.192(c)(7) and (c)(8).

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(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,161,442	RILITZ et al	11-1992
5,701,789	OKONSKI	12-1997
5,636,559	SMITHWICK, JR. et al	06-1997
2,402,223	WRIGHT	06-1946

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 8-10, 14, 16-17, 19, 26, and 28 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
 - i. In claim 8, clause (b) the term "it" is vague and indefinite. What is "it" referring to? The same applies to the rest of the claims. In line 9, the phrase "the direction of movement.." lacks clear antecedent basis.
 - ii. The following phrases lack clear antecedent basis: (claim 9) "the height"; (claim 16) "the direction of travel of the cutting die" (no "travel direction" has been set forth for the cutting die); and (claim 26) "the influence of centrifugal force".
 - iii. Claim 16 is vague and indefinite in that it is not clear what the claim encompasses. What is encompassed by "adapted to work in conjunction

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with a rotary anvil"? How is the rotary die "adapted to work"? Due to the nature of the art, the scope of the limitation is unascertainable.

Substantially the same applies to claim 26.

- iv. Claim 28 is vague and indefinite in that it is not clear what the claim encompasses. What is the claim referring to and where is this shown in the drawings? Moreover, which "base" is the claim referring to, the base of the cutting die or the base of the stripper?

- 2. Claims 1-4, 6, 15-17, 19, 21, 24, 26, and 28 stand rejected under 35 U.S.C. 102(b) as being anticipated by Rilitz et al.

Rilitz et al discloses a cross cutter comprising all the elements claimed including, *inter alia*, a base (7, 9); at least one scrap cutting blade (8, 11); and at least one scrap stripper (13, 14). See whole patent.

Regarding claim 16, the phrase "adapted to work..." has not been given significant patentable weight, since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

Regarding claim 28 and as best understood thereof, the stripper, i.e. the fingers thereof, is constructed "independently" of the base since the finger is separate from the base.

- 3. Claims 1-6, 8-10, 14-17, 19, 21, 24, 26, 28, and 29 stand rejected under 35 U.S.C. 102(e) as being anticipated by Okonski.

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Okonski discloses a cutting die system comprising all the elements claimed including, *inter alia*, a base/board (30); at least one scrap cutting blade (50); and at least one scrap stripper (40). See Figs. 1-4.

Regarding claim 16, the phrase "adapted to work..." has not been given significant patentable weight, since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

Regarding claim 28 and as best understood thereof, the stripper, i.e. the fingers thereof, is constructed "independently" of the base since the finger is separate from the base.

4. Claims 5, 7, 18, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over in Rilitz et al.

Regarding claim 5, Rilitz et al discloses the invention substantially as claimed except for a plurality of scrap strippers. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide Rilitz et al with a plurality of scrap strippers in order to facilitate stripping of larger area of the work piece, since it has been held that mere duplication of the essential working parts of a device involves only routine skill in the art. *St. Regis Paper Co. v. Bemis Co.*, 193 USPQ 8.

Regarding claims 7 and 18, Rilitz et al discloses the invention substantially as claimed including the stripper being made from rubber material. See c. 4, ll. 28-33. However, Rilitz et al does not set forth a specific range of durometer. In that regard, it

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would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of Rilitz et al with the claimed durometer range in order to obtain the desired elastomeric characteristic, since rubber material inherently includes a certain range of durometer values, and since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

5. Claims 7, 18, and 20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over in Okonski.

Okonski discloses the invention substantially as claimed except for the stripper being made from rubber material and durometer range. However, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device of Okonski with the claimed rubber material and durometer range in order to use a material with the desired stripping characteristic since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice, *In re Leshin*, 125 USPQ 416, and since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

6. Claims 1-10, 14-21, 24, and 26-29 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Smithwick Jr. et al in view of Okonski.

Smithwick Jr. et al discloses the invention substantially as claimed except for the flexible fingers 24 (on one row of fingers) extending outwardly over the base at an acute angle. However, Smithwick Jr. et al already teaches that the angular orientation of the

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fingers along with the adjacent notches allows the stripper to absorb compressive forces during the cutting operation while at the same time rebound to longitudinally direct a force which helps to free the scrap. See c. 4, ll. 11-28. Along that line, Okonski teaches a stripper (40) including a base (30) and flexible fingers extending outwardly over the base and at an acute angle within the range as claimed which suggests lessening of the compressive forces that the stripper experiences during the cut strip deflection and guidance operation while maintaining sufficient rebound longitudinal strength (force) to deflect and guide the cut portion of the web (70). See Figs. 1-4. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device and method of Smithwick Jr. et al with the finger extending over the base of the stripper at an acute angle as taught by Okonski in order to enhance the absorption of the compressive forces without compromising the longitudinally directed force required to free the scrap.

Regarding claim 16, the phrase "adapted to work..." has not been given significant patentable weight, since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

7. Claims 1-10, 14-21, 24, and 26-29 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Smithwick Jr. et al in view of Wright.

Smithwick Jr. et al discloses the invention substantially as claimed except for the flexible fingers 24 (on one row of fingers) extending outwardly over the base at an acute angle. However, Smithwick Jr. et al already teaches that the angular orientation of the

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fingers along with the adjacent notches allows the stripper to absorb compressive forces during the cutting operation while at the same time rebound to longitudinally direct a force which helps to free the scrap. See c. 4, ll. 11-28. Moreover, Wright teaches strippers (11) each including a base (at 25) and a finger (17) extending outwardly over the base and at an acute angle within the range as claimed for the purpose of allowing the fingers of the strippers to more easily compress when pressed against an obstacle. See Figs. 1-7, c. 5, l. 5 - c. 6, l. 14. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to provide the device and method of Smithwick Jr. et al with the finger extending over the base of the stripper at an acute angle as taught by Wright in order to facilitate ease of compression of the stripper fingers.

Regarding claim 16, the phrase "adapted to work..." has not been given significant patentable weight, since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

(11) Response to Argument

RE: Arguments B. - Indefiniteness Under 35 U.S.C. § 112¹

Initially, it is respectfully submitted to the Board that the Appellant concedes with respect to claim 8 on the issue of the term "it".² Therefore, claims 8-10 and 14

¹ Appeal Brief, p. 5, l. 20 - p. 7, l. 7.

² Id., p. 5, ll. 22-24.

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stand rejected as being indefinite until the Appellant's proposal to amend is presented. Moreover, this applies to all other claims using the term. It is also respectfully noted to the Board that most of the other indefiniteness issues on appeal will be conceded to in order to reduce the issues for consideration. Furthermore, it is respectfully noted that the indefiniteness issue with respect to claim 28 has been conceded by the Appellant.³

In response to Applicant's basic argument with respect to claim 8 that the phrase "the direction of movement..." is not indefinite,⁴ the Examiner concedes on this point.

In response to Applicant's basic argument that claims 9, 16 and 26 are definite,⁵ the Examiner concedes on these points.

RE: Arguments C. - Anticipation by Rilitz et al⁶

In response to Appellant's basic argument that Rilitz et al does not relate to a die cutter for cutting corrugated board,⁷ this argument is traversed.

First, with respect to the corrugated board, this has not been given significant patentable weight, since it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987). This applies to all of Applicant's arguments concerning "corrugated board" with respect to the apparatus claims under anticipation. Regarding the scrap ejection function, it is not clear how the strippers of Rilitz et al

³ Id., p. 7, ll. 4-7.

⁴ Id., p. 5, l. 24 - p. 6, l. 7.

⁵ Id., p. 6, l. 8 - p. 7, l. 3.

⁶ Appeal Brief, p. 7, l. 8 - p. 10, l. 18.

⁷ Id., p. 8, ll. 4-16 and p. 9, ll. 16-23.

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would not be construed as scrap ejectors. The implied meaning of “stripper” in this instance is a structure or device that facilitates guidance of unwanted or undesirable parts from the blades of the die. In that regard, the strippers of Rilitz et al inherently performs the same function whenever the cross cutting apparatus cuts an unwanted or undesirable portion from the web, since the strippers of Rilitz et al would act on all the to-be-cut portions of the web. To further explain, Rilitz et al’s device performs a cross-cutting function that cuts stock web into desired lengths. Note e.g., c. 1, ll. 6-68.

Typically, the stock web of material is supplied in roll form which has a given overall length. Moreover, the cross-cutter in Rilitz et al is not normally limited to cutting only one length, e.g. it is not limited to cutting stock into 6’ web product sheets. A plurality of different lengths will be cut from stock. To optimize use of the known length of the stock web and to minimize waste or scrap, a certain number of products sheets will be calculated and cut from the stock web. However, there are times when excess material or scrap will result depending on the length requirements of an order. Since Rilitz et al cuts the stock material web no matter whether the end product has the correct length, the incorrect length product sheet will be disposed of as scrap. Thus, Rilitz et al’s device performs both the main cutting and scrap cutting function. In any event, there is no need for Rilitz et al to explicitly disclose that the blades therein are “scrap” cutting blades, since the claims do not differentiate between one form of cutting blade from another by the fact that, e.g. claim 1, does not explicitly set forth any other “blades” outside of the intended function. In other words, the mere use of the adjective “scrap” in “scrap cutting blade” relates to the intended use of the blade to cut scrap. In that regard, since Rilitz et al inherently includes both functionalities, it is the Examiner’s

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opinion that Rilitz et al anticipates the claim. Regarding Appellant's assertion that functional language should be given patentable consideration, this is traversed to the extent that intended use has no bearing under anticipation.

Second, Appellant asserts that the strippers of Rilitz et al are limited to only guiding the flexible material or web.⁸ However, the Appellant fails to appreciate the fact that these strippers act on the web through a certain sector of rotation of the rotary drums which include before and after the actual cut. Moreover, as the web of material is passing in the nip between the rollers (1a, 2a) in the situation shown in Fig. 1, the stripper (13) acts against the other stripper (14) during the cutting action, i.e. stripper (13) is urging the cut scrap against the other stripper (14) which is located on the anvil cylinder (1a). Compare Figs. 1-2 of Rilitz et al and c. 6, ll. 12-32. Thus, besides guiding, the strippers aid in disengaging the cut web from the respective dies which is the exact functionality of a stripper.

Third, the Appellant's assertion that Rilitz et al does not include the base and a flexible finger integral with the base⁹ is not clearly understood. It is clear from the showing in Fig. 2 of Rilitz et al that the strippers (13, 14) each include a base and a flexible finger integral with and extending from that base. Note the substantial L-shape shown therein. Just because Rilitz et al does not have the exact same depiction as shown in Fig. 2 of the application does not overcome the fact that Rilitz et al anticipates this limitation especially since claim 1 does not set forth any limitations that read exactly on the depiction of the application Figure. The Appellant is reminded that although the

⁸ Id., p. 8, l. 17 - p. 9, l. 15.

⁹ Id., p. 10, ll. 1-15.

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claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). For substantially the same reasons above, it is clear that Rilitz et al anticipates claim 15 contrary to the Appellant's contentions. Moreover, Rilitz et al's strippers are constructed out of compressible material since they are made of rubber or elastomeric material.

RE: Arguments D. - Anticipation by Okonski¹⁰

In response to the Appellant's basic that Okonski does not anticipate the claimed invention, this argument is traversed.

First, the Appellant again asserts that there is a distinction in the claims because of the corrugated board. Again, the Examiner's comments *supra* relating to this issue apply here. In sum, the work being corrugated board is not given any significant patentable weight.

Second, the Appellant's argument is basically couched in the assertion that Okonski does not include strippers constructed of compressible material.¹¹ However, this is non-distinguishing since even "steel" is compressible to a degree in the argued manner. It is respectfully submitted to the Board that independent claim 1 does not include any limitations regarding "compressible material" of the strippers. Therefore, the Appellant's current argument would not apply to claim 1. Independent claims 8 and 15 do include these limitations. However, it is the Examiner's position that neither

¹⁰ Appeal Brief, p. 10, l. 19 - p. 13, l. 13.

¹¹ Id., p. 10, l. 22 - p. 11, l. 14.

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independent claims set forth how much “compression” is required to meet this limitation. In that regard, it is known from the basic understanding of deformation of materials that even “steel” experiences compression to a degree whenever such force is applied on the material especially in the environment that the strippers function in Okonski. The strippers (40) in Okonski are urging the material to be cut against the anvil (60), and due to the inherent fact that they experience sufficient pressure from the act of the blades (50) acting against the surface of the anvil (60) to thereby cut the web, the strippers will be forced downwardly (as shown in Fig. 4 of Okonski) from the equal but opposite forces exerted by the anvil against the strippers and the cutting cylinder (2) and the material of the strippers will be compressed to a degree. It may not be as much as what a rubber or elastomeric material may be compressed, but there is nothing in the claims that requires the Examiner to read theses limitations contrary to the reasonably broad manner as set forth in Final Office Action, i.e. there are NO limitations in the claims regarding the degree to which the stripper material must be compressed. Furthermore, the base (54) on which the strippers are an integral part also experience limited compression since the base also partakes of the forces experienced by the stripper fingers. The above applies to the Appellant’s argument with respect to paragraph (D) of claim 8.¹² Attention is respectfully directed to the Appellant’s implication that claim 1 also includes the “compressible” limitation.¹³ However, a clear reading of claim 1 shows that the claim does not include any limitations regarding “compression”. The claim merely calls for “resilient material”.

¹² Id., p. 12, ll. 5-10.

¹³ Id., p. 11, ll. 12-14.

Third, the Appellant argues that claim 8 is not met by Okonski because, allegedly, Okonski is not cutting corrugated board.¹⁴ However, corrugated board is a form of paper and it is clear from the teachings of Okonski that the teachings therein also encompasses corrugated board. Note e.g., c. 1, ll. 41-53 wherein Okonski discusses the prior art which includes cutting and scrap removal of corrugated board. Regarding Appellant's assertion that Okonski does not a base, this is not clearly understood. Clearly, Fig. 2 of Okonski shows the base (54) from which the fingers (40) extend.

Fourth, the Appellant alleges that paragraph (F) is not met by Okonski. This is not clearly understood. As best understood of the Appellant's argument, it appears that the Appellant is asserting that because Fig. 4 of Okonski shows the cutting cylinder (20) and the anvil cylinder (60) separated relatively far apart from each other the fingers of Okonski do not hold and push the scrap against the anvil. However, this flies in the face of art teachings in Okonski. The Board's attention is respectfully directed toward the fact that in actuality, both cylinders would be close to each other. Otherwise, no cutting would be made if the cylinders operate at the distance depicted of Fig. 4. In other words, this Figure is schematically showing the operational relationship between the cylinders, but in actual practice and in order for the cylinders to facilitate the cut, the cutting edge of the blade (50) must be inserted through the thickness of the web (70) and into the surface anvil (60). Thus, contrary to the Appellant's assertions, Okonski in fact meets the limitations of claim 8.

Fifth, the Appellant's allegation that Okonski does not meet the limitations of claim 15 because, allegedly, claim 15 requires the stripper to be formed independently of

¹⁴ Id., p. 11, l. 15 -

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the die board¹⁵ is far off point. Nothing in claim 15 sets forth any specific limitation that requires consideration of “independent” formation of these parts. Claim 15 merely requires a die board and a scrap stripper having the base and finger. There is nothing in the claim that calls for these parts to be wholly separate from each other. Therefore, the Appellant’s argument is non-distinguishing with respect to claim 15. Again, the Appellant is advised that limitations from the specification are not incorporated into the claims.

RE: Arguments E. - Obviousness in view of Rilitz et al¹⁶

In response to the Appellant’s basic argument that Rilitz et al does not render obvious claims 5, 7, 18 and 20, this argument is not dispositive since the Appellant does not set forth any substantial reason against Rilitz et al and hinges the point on the allegation that Rilitz et al allegedly does not anticipate the claims.

RE: Arguments F. - Obviousness in view of Okonski¹⁷

In response to the Appellant’s basic argument that Okonski does not render obvious claims 7, 18 and 20, this argument is not dispositive since the Appellant does not set forth any substantial reason against Okonski and hinges the point on the allegation that Rilitz et al allegedly does not anticipate the claims.

¹⁵ Id., p. 123, l. 20 - p. 13, l. 5.

¹⁶ Appeal Brief, p. 14, ll. 13-18.

RE: Arguments G. - Obviousness Smithwick, Jr. et al in view of Okonski¹⁸

In response to Appellant's basic argument that the claimed invention is not obvious over Smithwick Jr. et al and Okonski, this argument lacks merit.

First, in response to Appellant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning,¹⁹ it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the Appellant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Second, the Appellant's assertions with respect to the work being corrugated board²⁰ has been addressed *supra*.

Third, in response to Appellant's argument that there is no suggestion to combine the references,²¹ the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the suggestion to combine

¹⁷ Appeal Brief, p. 13, ll. 18-21.

¹⁸ Appeal Brief, p. 14, l. 1 - p. 16, l. 13.

¹⁹ *Id.*, p. 14, ll. 1-9.

²⁰ *Id.*, p. 14, ll. 10-17.

²¹ *Id.*, p. 14, l. 18 - p. 16, l. 13.

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stem from both references. Smithwick Jr. et al teaches rubber (inherently resilient and compressible) strippers with fingers extending at an angle that is not acute. Moreover, Smithwick Jr. et al teaches that the angular orientation of the fingers along with the adjacent notches allows the stripper to absorb compressive forces during the cutting operation while at the same time rebound to longitudinally direct a force which helps to free the scrap. Okonski teaches strippers having the fingers disposed at an acute angle which suggest lessening of the compressive forces could be had in a resilient scrap stripper via the acute angle for performing the same stripping function. Thus, it would have been obvious to the ordinary artisan at the time of the instant invention to modify Smithwick Jr. et al with the teachings of Okonski for the reasons stated in the rejection *supra*. It is irrelevant whether Okonski is not intended to be used in slots since this is not the feature relied on with respect to Okonski. Moreover, nothing in the claims requires consideration of the Appellant's point.

Fourth, the Appellant's assertions that the ordinary artisan would not want to increase or enhance the compressive force misses the point by far. As noted in the rejection, the Examiner stated that Okonski's teachings suggest lessening of the compressive force required to perform the scrap ejecting function. Therefore, "enhancement" in the context of the rejection refers to the resulting stripper's ability to absorb more of the compressive forces acting thereon due to the fact that the resulting fingers would more easily "bend" and NOT to increasing these forces.

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RE: Arguments H. - Obviousness Smithwick, Jr. et al in view of Wright²²

In response to the Appellant's argument against Smithwick, Jr. et al in view of Wright, the Examiner concedes on this issue.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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April 22, 2002

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²² Appeal Brief, p. 14, l. 1 - p. 16, l. 13.